No. 88-179

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

JONATHAN CLUB,
Appellant,
VS.
CALIFORNIA COASTAL COMMISSION,
Appellee.

On Appeal From the California
Court of Appeal, Second Appellate District

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM	1
I.	
INDEPENDENT STATE GROUND	2
II.	
THE COMMISSION'S ATTEMPT TO DISTINGUISH GOLDEN V. BISCAYNE BAY YACHT CLUB	3
III.	
CONCLUSION	4

TABLE OF AUTHORITIES

Cases

	Page
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)	2
Golden v. Biscayne Bay Yacht Club, 530 F.2d 16 (5th Cir. 1976), (*en banc*), *cert. denied*, 429 U.S. 872 (1976)	1, 3, 4
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)	2
Sanfilippo v. County of Santa Cruz, 415 F.Supp. 1340 (N.D. Cal. 1976)	2
Stout v. Buttorff, 246 F.Supp. 825 (S.D. Ind. 1965)	2

Constitution

United States Constitution, Art. VI, cl. 2	2

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Appellant Jonathan Club ("Appellant") raises only two points in its present Brief Opposing Motion to Dismiss or Affirm, because those raised by Appellee California Coastal Commission (the "Commission") in its Motion to Dismiss or Affirm are refuted effectively in Appellant's Jurisdictional Statement (including citations to the portions of the record at which, contrary to the Commission's assertion, Appellant's federal Constitutional arguments were raised below). Appellant wishes to reply briefly, however, to the contentions of the Commission that the Court of Appeal's decision rests adequately upon an independent state ground and that the Court of Appeal distinguished the Fifth Circuit Court of Appeals' holding in *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16 (5th Cir. 1976) (*en banc*), *cert. denied*, 429 U.S. 872 (1976).

I.

INDEPENDENT STATE GROUND

The Commission seeks to insulate the Court of Appeal's Opinion from attack on federal Constitutional grounds by virtue of the fact that the court cited the California Constitution, in addition to the United States Constitution, in support of its holding. This contention is misplaced. Appellant complains of patent violations of its associational, due process and other rights. A state constitution may provide *greater* protection for Appellant's rights than the United States Constitution; but it cannot provide *less*. An act which is valid under a state constitution is, nonetheless, invalid under the United States Constitution by simple operation of the Supremacy Clause if it satisfies the state, but not the federal, standard of protection for a constitutional right. The federal Constitution is not necessarily the ceiling for protection of such rights, but it most certainly is the floor. *Sanfilippo v. County of Santa Cruz*, 415 F.Supp. 1340, 1343 (N.D. Cal. 1976); *Stout v. Battorff*, 246 F.Supp. 825, 831 (S.D. Ind. 1965); U.S. Const. art. VI, cl. 2.

Moreover, the Court of Appeal Opinion specifically construed the United States Constitution and federal cases interpreting it, especially on the "state action" issue. (*See* discussion of *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), at Opinion, pp. A-7 - A-15.) If the Court of Appeal wished to premise its holding on state constitutional grounds, it should not have intruded into the federal arena.

II.

THE COMMISSION'S ATTEMPT TO DISTINGUISH GOLDEN V. BISCAYNE BAY YACHT CLUB

In attempting to distinguish *Golden v. Biscayne Bay Yacht Club, supra*, from the present case, the Commission and Court of Appeal rely upon the fact that the rent paid to the state in *Golden* was nominal, while that in the present case was some $40,000 per year. This reliance is unfounded, as the comparison of the nominal rent paid in *Golden* to that paid in the present matter actually *supports* Appellant's argument. If a state leases land to a private party at nominal rent, as in *Golden*, the state, in effect, has made a gift or subsidy to that party. The state, presumably for some policy reason, evidently has an interest in seeing that the private party's business endeavor succeeds. In that event, the case for finding entanglement is much better than under the present set of facts; yet *even that situation* was not sufficient for the *Golden* court to find state action. State action should never have been found on the weaker showing of entanglement presented here. The fact that Appellant and the State of California ("State") were disinterested parties who dealt at arm's length is patent from the amount of rent charged by the State. The act of a state in accepting $40,000 per year is hardly a subsidy.

The Court of Appeal's attempt to distinguish *Golden* further relies upon the purported factor that there was no public exclusion from "needed, otherwise usable public beach" in *Golden*. As the record indicates, however, the public in this case also has access to the beach surrounding Appellant's facility. The public is "excluded" only as it would be excluded from walking through a private home to gain access to the beach. Access to the beach by nonmembers clearly exists by the simple expedient of walking through the existing public walkway and the proposed vertical accessway. (C.T., p. 451, 570.) Thus, the factor which the Court of Appeal perceived as distinguish-

ing *Golden*, that "there was no evidence in *Golden* that the club's use of the bottom lands in any way limited or interfered with the citizens' use of public waters," applies equally to the present case and is completely unpersuasive as a distinguishing factor.

The Commission has left untouched the real issue regarding *Golden*, which is that the Court of Appeal Opinion creates a blatant inconsistency between federal and California law on the "state action" issue, as articulated in two cases arising on absolutely indistinguishable facts. That is an intolerable situation which this Court must take the present opportunity to correct.

III.

CONCLUSION

For these reasons, and on the authorities cited, Appellant respectfully urges the Court to deny the Commission's motion, and note probable jurisdiction of the present appeal.

DATED: September 23, 1988

Respectfully submitted,

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